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In the Supreme Court of the United States.

October Term, 1897.

No. 106.

THE NEW YORK INDIANS
vs.
THE UNITED STATES.

Appeal from the Court of Claims.

REPLY BRIEF FOR THE APPELLANTS ON MOTION TO AMEND INSTRUCTIONS TO THE COURT OF CLAIMS.

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For the Appellants.

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I.

The Attorney-General in his brief admits that the instructions to the Court of Claims should be modified so as to give judgment for the value of lands disposed of by the Government for other considerations than cash. As we understand it that is the only point raised by our motion.

II.

His second point is that the motion opens for discussion before this Court the question of who are or should be beneficiaries under the judgment. This question we had supposed to be fully settled by the findings of fact and opinion of the Court of Claims and by the opinion of this Court.

The questions as to who were parties were fully considered by the Court of Claims and decided against the present contention of the Attorney-General (see Finding of Fact I, Record, p. 7, and the opinion of the Court of Claims, Record, pp. 31 and 32 and 36 and 37), and they were again argued in this Court, and the finding of the lower court either affirmed or left undisturbed.

(*Note.*—The Attorney-General states that Senate Document "Confidential B," which we referred to in the reargument, was not before the Court of Claims and intimates that that Court might have ruled differently as to parties if it had been. While "Confidential B" was not in the case below, all the facts now relied upon by the Attorney-General were in the record in the Court below, having been obtained from other sources.)

On page 12 of the opinion this Court says:

"Second. The lands covered by the treaty were identified, described by metes and bounds, and an appropriation was made to aid in the immediate removal of the Indians to their new home. *There was no uncertainty as to the lands granted, or as to the identity of the grantees,* which, in the case of Heydenfeldt *vs.* Daney Mining Co. (93 U. S., 634), was held to turn it into a grant *in futuro.*"

Again, on page 17 of its opinion, in speaking of the Council of June 2, 1846, this Court says that **four** of the tribes did not wish to go West, but "There is no finding that the other *five tribes* did refuse," thus clearly indicating that all nine tribes mentioned in *Schedule A* are parties to the treaty. And again, on page 18 of its opinion, this Court says: "But the Tonawandas were but (part of) one of *the nine tribes which participated in the treaty.*"

Moreover, as we read the opinion, this Court holds that by Article II of the Treaty, there was a grant *in presenti* of the lands therein mentioned, to wit, 1,824,000 acres to the

Indians, and that Article in terms states that it is intended as a future home "for all the New York Indians now residing in the State of New York, *or in Wisconsin, or elsewhere in the United States, &c.,*" and in the conclusion of that article it states that it is intended as a future home for "the Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridge, Munsees, and Brothertowns, residing in the State of New York, and the same to be divided equally among them *according to their respective numbers, as mentioned in the schedule hereunto annexed.*" This schedule contains a list of these same nine tribes, and on its face shows that a portion of the Indians resided in Wisconsin.

Moreover, the Government has recognized the right of all these Indians to participate by negotiating the treaty in 1868, in which the Wisconsin Indians were expressly provided for. (See Opinion, p. 20.)

In any case, however, the 1,824,000 acres were granted to such of the Indians as were included in the grant, so that the amount of the judgment to be entered would not be changed, and the only difference would be in the distribution of the proceeds.

All these questions, therefore, as to parties and beneficiaries, and as to the extent of the grant, have been already determined, but the Attorney-General treats our motion as an application for a rehearing on these points and contends—

(*a*) That the Onondagas at Onondaga are not beneciaries because they did not sign the Treaty or assent to the amendments.

(*b*) That the Oneidas of Wisconsin are not beneficiaries because they did not assent to the amended Treaty, and because they, by their treaty of February 3, 1838 (7 Stat., 566), ceded to the United States all their rights to the 500,000 acres in Wisconsin in consideration of $33,500.

(*c*) That the Stockbridges, Munsees and Brothertowns are not beneficiaries, because they did not sign the Treaty or assent to the amendments, and because they had no interest in the 500,000 acres in Wisconsin.

(*d*) That the grant was only of 320 acres to each of the Indians of the tribes that were parties to the Treaty.

(*e*) That the 176 Indians who went to Kansas and either died or returned to New York never having received a patent, lost thereby all rights to the Kansas lands.

Should the Court determine to again consider these questions we submit:

First. That, with reference to the Onondagas at Onondaga, they were enumerated as parties and beneficiaries under the treaty of 1832, whereby the 500,000 acres in Wisconsin were ceded to the New York Indians. They were also named as parties and beneficiaries of the treaty of Buffalo Creek; and the President and Senate declared that that treaty as amended had been assented to by the several tribes of New York Indians, and the President proclaimed the treaty as ratified and confirmed in every Article and clause thereof. These Onondagas are expressly mentioned in Schedule A, annexed to and made part of the Treaty; and they have received no compensation for the loss of their share in the Wisconsin lands. These contentions are supported by the decision of the Court of Claims on pages 31, 32 and 36, 37. See also Van Buren's message to the Senate, Executive Journal, Vol. V, page 182, in which the assent of *all* the tribes except the Senecas is asserted. Moreover, some of the Onondaga chiefs (those residing with the Senecas) did sign the Treaty and assent to the amendments, and it is for the Senate and President alone to determine whether or not this bound the whole tribe.

Second. The Attorney-General says the Oneidas of Wisconsin did not assent to the amended Treaty, citing as proof the report of the Commissioner as set out in "Confidential B." This report was made more than a year before the Treaty was proclaimed. All that has been said above as to the declarations of the President and Senate, that *all* the tribes *had* assented to the amendments, applies equally to the Oneidas of Wisconsin. It was also for the President and Senate to determine whether or not the signatures of of that portion of the Oneida tribe residing in New York was sufficient for the whole tribe, especially in view of the fact that the assent to the amended Treaty was as follows: "We the undersigned chiefs of the Oneida tribe of New York Indians do give our free and voluntary asssent," &c., and is signed "First Christian Party," giving eleven signatures. "Orchard Party" giving four signatures, among which is the name, "Henry Jordan," which, as will be seen, is among the Oneidas of Green Bay, who signed the original treaty. "Second Christian Party" giving five signatures, making a total of twenty signatures to the amended treaty by the Oneidas, while there were but six Oneida signatures to the original treaty, four of whom were from Wisconsin, Jordan being one of the four.

The Attorney-General further claims that the Oneidas of Wisconsin ceded by the Treaty of February 3, 1838, all their rights in the 500,000 acre tract for the sum of $33,500. In response to this allegation we declare that the Attorney-General has wholly misapprehended the terms of the treaty of February 3, 1838. This latter treaty was made after the treaty of Buffalo Creek was made and pending before the Senate. In Article 19 of this latter treaty as originally drawn was a provision for paying the Wisconsin Oneidas $33,500, which provision was in the following words: "As a remuneration for money laid out and expended by said

parties (Orchard and First Christian Oneidas), and for services rendered by their chiefs and agents in securing the title to the Green Bay lands and removing to the same." (Record, p. 14.)

This language is literally carried into the third Article of the Treaty of February 3, 1838. This latter treaty, upon the terms of which the Attorney-General relies to cut off the Oneidas of Wisconsin, discloses no other consideration running from the United States to the Indians than this $33,500 which they were to get under the terms of original Article 19 of the Treaty of Buffalo Creek, as a special additional allowance, which article was stricken out by the Senate in view of the subsequent treaty of February 3, 1838.

Thus the claim of the Attorney-General that the Oneidas at Green Bay were paid $33,500 for their interest in the 500,000 acres is shown to have no support whatever. Again, it should be noted that Articles 1 and 2 of the treaty of February 3d have relation only to the tract of land which was excepted from the 500,000 acres in the first Article of the Treaty of Buffalo Creek, and which was occupied by the Oneidas. The two articles named provided for conveying to the United States the balance of this excepted tract, after allowing the Oneidas 100 acres each. Another claim of the appellant is to the effect that the fact that the Senate struck out Article 19 of the original Treaty proves that the Oneidas at Green Bay were no longer parties to it. Yet that Article contained the following language:

"It is expressly agreed that if the Senate of the United States does not ratify and confirm the above, in relation to the Green Bay Indians, it shall not invalidate any of the other provisions of this Treaty." (Record, p. 14.)

Thus the two treaties, read together, entirely dispose of the contention of the Attorney-General on this point.

Third. As to the proposed exclusion of the Stockbridges, Munsees, and Brothertowns from sharing in the results of the judgment, because of their failure to sign the original Treaty or assent to the amendments, sufficient has been said above in discussing the rights of the other Indians who are named as beneficiaries, but who did not sign the Treaty. However, it may properly be added here, that it was not at all necessary that these Indians should sign the treaty in order to be parties thereto. They were to share the benefits. This made them parties with an interest that could be enforced. The law of contracts on this point is plain. And it may also be said that at the time the Treaty was made the Oneidas of New York claimed that these Western Indians were their wards, and they were legally capable of contracting on their behalf, and hence they signed the Treaty "for themselves and their parties." (7 Stat., 555.) This claim on the part of the New York Oneidas has corroboration in the Treaty of November 11, 1794 (7 Stats., 45), where in Article 4, the lands of the "Six Nations, *or their Indian friends residing thereon and united with them*" are mentioned.

It is quite likely that the officers of the Government who negotiated the Treaty took the same view.

But the Attorney General says that these three small tribes had no interest in the 500,000 acre tract ceded to the United States by the Treaty.

An examination of the Treaties shows this contention to be erroneous.

The Treaty of February 8, 1831 (7 Stats., 342), between the Menominees and the United States and the modification of the same of February 17, 1831, by which the Menominees ceded this 500,000 acre tract speaks only of "*the New York Indians*," or "*the several tribes of the New York Indians*," and what constituted "*the New York Indians*" is expressly

stated in the appendix to the Treaty of October 27, 1832, found in 7 Statutes, 409, where, in speaking of this grant, the New York Indians are decribed as "*the New York Indians, more particularly known as the Stockbridge, Munsee, and Brothertown tribes, the Six Nations, and the St. Regis tribe.*"

This Treaty of February 7 and 17, 1831, was ratified by the Senate with a proviso "*that for the purpose of establishing the rights of the New York Indians on a permanent and just footing,*" two townships of land shall be laid off for the use of Stockbridge and Munsee tribes, and one township for the use of the Brothertown tribe in lieu of the reservations then occupied by those tribes which they were obliged to surrender, and the improvements on which were to be paid for. (See Proviso, 7 Stats., 347.)

These special grants of these townships were *in addition* to their rights, in common with the other New York Indians in the 500,000 acre tract, and were intended not only to compensate them for the trouble of moving, etc., but were in conformity with an agreement entered into between the Indians on January 8, 1825, by which the Brothertown Indians purchased from the other New York Indians a special reservation, and after allowing to each of the other tribes a separate reservation of like size, provided for the holding of all the balance in common. This agreement is set forth in a note in Senate Document No. 189 of the Second Session of the Twenty-Seventh Congress, and was made part of the Record in the Court of Claims.

Under this agreement the Brothertowns, Stockbridges and Munsees, and Oneidas, occupied their separate reservations, and when the Treaty of 1831 was made, it was found that the reservations of the Brothertowns and Stockbridges and Munsees fell without the 500,000 acre tract,

while that of the Oneidas fell within it. Hence to compensate the Brothertowns and Stockbridges and Munsees the separate townships were granted to them, and later when the Treaty of Buffalo Creek of January 15, 1838, was entered into these townships were not included, nor was the Oneida reservation. This, as has already been shown, was reserved from the cession to the United States in Article 1 of that Treaty. These four tribes were entitled to special consideration because of their efforts in securing and settling the Wisconsin lands; and all the other negotiations between these Wisconsin tribes and the United States, referred to in the brief of the Attorney-General, had reference either to these special reservations or to the regulation of the internal affairs of these tribes.

Fourth. The parties to the Treaty of Buffalo Creek recognized the fact that the numbers of the various tribes as enumerated in Schedule A, had increased since the time that enumeration was made, and hence the grant was made greater than 320 acres each for the number of Indians named in the schedule, but as it was assumed that the increase would naturally be about the same, this schedule was used as a basis for a proportionate distribution. This excess may also have been due in part to the belief that there were some straggling New York Indians who had not been enumerated, for the grant in Article 2 was to "all the New York Indians now residing in the State of New York, or in Wisconsin, *or elsewhere in the United States, who have no permanent homes.*"

Fifth. The attempt to reduce the amount of the award by the amount that would be the share of the 176 miserable Indians who undertook to go to Kansas, and who either

died from exposure or were forced to return home, needs no answer. It only serves to show the spirit in which this claim is being contested by the present representatives of the Government.

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